SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 648

THE UNITED STATES OF AMERICA, PETITIONER

vs.

D. B. HELLARD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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A [Caption omitted.]

1 In the United States Circuit Court of Appeals for the Tenth Circuit

No. 2703

UNITED STATES OF AMERICA, APPELLANT

vs.

D. B. HELLARD, APPELLEE

Statement of points on appeal

Filed March 6, 1943

The United States of America, appellant herein, makes the following statement of the points on which it intends to rely on appeal:

1. The trial court erred in holding that the District Court of Creek County, Oklahoma, was vested with jurisdiction to order and decree the partition and sale of the lands involved in this action, to-wit, the Southwest Quarter (SW¼) of Section Twenty-five (25), Township Eighteen (18) North, Range Ten (10) East, Creek County, Oklahoma.

2. The trial court erred in holding that the United States of America was not a necessary and indispensable party to the action instituted in the District Court of Creek County, Oklahoma, to partition the lands involved herein.

3. The trial court erred in holding that service of notice in the manner authorized by section 3 of the Act of Congress of April 12, 1926 (44 Stat. 239) of the pendency of the action instituted in the District Court of Creek County, Oklahoma, to partition the lands involved herein, was not required as a prerequisite to the jurisdiction of such court to order and decree the partition of such lands.

4. The trial court erred in not holding that the United States was not bound in the action instituted in the District Court of Creek County, Oklahoma, to partition the lands involved herein.

5. The trial court erred in holding that neither the Secretary of the Interior nor the Superintendent of the Five
2 Civilized Tribes was entitled to the control or custody of the proceeds derived from the sale in partition of the lands involved herein.

6. The trial court erred in decreeing that the plaintiff, D. B. Hellard, is the owner of the legal title in fee simple to the lands involved in this case, and that his title is valid, perfect and superior

to any right or interest of the defendants or intervener herein, and that the defendants have not right, title or interest in and to said premises.

7. The trial court erred in not decreeing that the sheriff's deed in the partition sale should be vacated and cancelled of record, that the title to the lands involved in this case should be quieted in the defendants, and that the plaintiff had no right, title or interest therein.

NORMAN M. LITTELL,
Assistant Attorney General
WHIT Y. MAUZY,
United States Attorney,
Tulsa, Oklahoma.
VERNON L. WILKINSON,
DWIGHT D. DOTY,
Attorneys, Department of Justice,
Washington, D. C.

[File endorsement omitted.]

United States Circuit Court of Appeals

Designation of contents of record on appeal

Filed March 6, 1943

The United States of America, appellant herein, makes the following designation of the record it desires to be contained in the record on appeal:

1. Transcript of record from District Court of Creek County.
2. Motion for permission of the United States to intervene.
3. Order granting the United States permission to intervene.
4. Complaint in intervention.
5. Answer and reply of plaintiff to complain in intervention.

3

6. Agreed statement of facts.
7. Findings of fact and conclusions of law.
8. Decree entered October 30, 1942.
9. Notice of appeal filed January 27, 1943.
10. Statement of points on appeal.
11. This designation.

NORMAN M. LITTELL,
Assistant Attorney General,
WHIT Y. MAUZY,
United States Attorney,
Tulsa, Oklahoma.
VERNON L. WILKINSON,
DWIGHT D. DOTY,
Attorneys, Department of Justice,
Washington, D. C.

[File endorsement omitted.]

4 In the District Court of the United States in and for the Northern District of Oklahoma

Pleas and Proceedings before The Honorable Royce H. Savage, United States District Judge in and for the Northern District of Oklahoma, presiding in the following entitled cause, to wit:

No. 64 Civil

D. B. HELLARD, PLAINTIFF

vs.

ETHLEENE FULSOM, NOW BEVENUE, ANDERSON ALLEN, OTHERWISE KNOWN AS ANDERSON CHAR-CO-TE-TEN-NA, SA-KO-TAH HAY, NEE STALEY, DESHALECOWENEY HAY, OTHERWISE KNOWN AS JOE HAY, MODIE HAY, EVA BARNETT, NEE HAY, AKD LOFA HAY, DEFENDANTS.

UNITED STATES OF AMERICA, INTERVENER

In the District Court of Creek County, State of Oklahoma

D. B. Hellard, Plaintiff, vs. Ethleene Fulsom, now Bevenue, Anderson Allen, otherwise known as Anderson Char-co-te-ten-na, Sa-Ko-tah Hay, nee Staley, Deshalecoweney Hay, otherwise known as Joe Hay, Modie Hay, Eva Barnett, nee Hay, and Lofa Hay, Defendants. No. 24431.

Petition

Filed July 5, 1941

Comes now the plaintiff, and for his cause of action against the defendants above named, alleges and states:

That the plaintiff is the owner of the fee simple title to, and is in the exclusive possession of the following described real estate and premises, situate in Creek County, Oklahoma, to wit:

The Southwest Quarter (SW4) of Section Twenty-five (25), Township Eighteen (18) North, range Ten (10) East;

5 That the plaintiff acquired his title to said lands in the following manner;

That Polly Char-coten-na was a full-blood member of the Creek or Muskogee Tribe of Indians, duly enrolled as such opposite Roll Number 6892 of the approved rolls of said Tribe, and that the premises above described were allotted to her, the said Polly

Char-co-ten-na, as her distributive share of the lands of said Tribe; that homestead patent for allotment deed covering said lands were duly executed and delivered to her, the said Polly Char-co-te-ten-na in the manner provided by law; that said deeds are duly recorded in the office of the County Clerk of Creek County, Oklahoma, in patent record 2, at page 629, and patent record 5, at page 211, respectively, to which record reference is hereby made, and the same are hereby made a part of this petition, as though herein set forth, pro forma.

That the said Polly Char-co-te-ten-na died intestate on the 5th day of January, 1938, and was seized and possessed of said lands at the date of her death, and that she, the said Polly Char-co-te-ten-na left surviving as her sold and only heirs the following named persons: John Hay, a son: Anderson Allen, otherwise known as Anderson Char-co-te-ten-na, a grand-son; and Ethleene Fulsom, now Bevenue, a great grand-daughter, and that such land descended to them under the laws of the State of Oklahoma in equal shares. That the said John Hay was a full-blood member of the Creek or Muskogee Tribe of Indians, duly enrolled as such opposite roll number 6895 of the approved rolls of said Tribe of Indians, and the defendant, Anderson Allen, and Ethleene Fulsom, now Bevenue, are each un-enrolled full-blood members of the said Tribe of Indians.

That the said John Hay died intestate on the 26th day of March, 1928, and was at the date of his death seized and possessed of the interest in said lands so inherited by him from the said Polly Char-co-te-ten-na as above set forth; that the said John Hay left suriviving as his sole and only heirs the following persons:

Sa-ko-tah Hay, nee Staley, the surviving widow; Deshale-
6 coweney Hay, and Modie Hay; Eva Barnett, nee Hay and Lofa Hay, surviving children. That Sa-Ko-tah Hay, nee Staley, Deshalecoweney Hay and Modie Hay are each enrolled full-blood members of the Creek Tribe of Indians, enrolled opposite Roll numbers 1910, 6897 and N. B. 85C, respectively, upon the approved rolls of such Tribe, and that Eva Barnet, nee Hay, and Lofa Hay, are each enrolled full-blooc members of said Tribe of Indians.

Plaintiff says that on the 8th day of October 1940, Lew Wilder, the duly qualified and acting Sheriff of Creek County, Oklahoma, pursuant to the orders and judgments of the District Court of Creek County, Oklahoma, made and entered in cause number 25920, of the causes pending in said court, and entitled Ethleene Fulsom, now Bevenue, and others, plaintiff v. Anderson Allen, or Char-co-te-ten-na, and others, defendants, made, executed and delivered to this plaintiff his certain sheriff's deed in partition,

thereby vesting the plaintiff with the fee simple title to said lands. That said deed was duly filed of record in the office of the County Clerk of Creek County, Oklahoma, on the 12th day of October 1940, and recorded in book 473, at page 112, of the records in said office. A true and correct copy of said deed is hereto attached, marked Exhibit "A," and is made a part hereof as though set forth pro forma.

That the defendants above named claim some right, title or interest in and to said real estate and premises, the exact nature of which claims is to plaintiff unknown, but the same constitutes a cloud upon plaintiff's title to said lands.

Wherefore, plaintiff prays that he have judgment against said defendants adjudging that plaintiff is the owner of the legal title in fee simple in and to the above described lands, free and clear of any claim on the part of the defendants herein, and adjudging that the defendants have no right, title or interest therein; and that the defendants, and each of them, be restrained and enjointed from claiming or asserting any right, claim or interest therein, and that the title of plaintiff be quieted and confirmed; and that plaintiff have all other and further relief, legal or equitable, to which he may be entitled in the premises, and for his costs herein.

GEORGE H. JENNINGS,
Attorney for Plaintiff.

Exhibit A to Petition

311-724 File No. 47724

Sheriff's Deed Under Partition Sale

This Indenture, made this 8th day of October, 1940, by and between Lew Wilder, as Sheriff of Creek County, in the State of Oklahoma, party of the first part, and D. B. Hellard, party of the second part.

Witnesseth: That Whereas, by virtue of an alias order of sale issued on the 28th day of August 1940, by the District Court within and for Creek County, State of Oklahoma, in Cause No. 23920, in which Ethleene Fulsom now Bevenue, et al., were plaintiffs, and Anderson Allen, et al., were defendants, commanding said Sheriff to sell the real estate and premises, involved in said action and hereinafter described, at public auction, to the highest bidder, after giving notice of the time and place of said sale according to law, to satisfy a judgment made and entered in said cause on the 24th day of June 1940, for the partition of the following described real estate, situated in Creek County, State of Oklahoma, to wit:

Southwest Quarter of Section 25, Township 18 North, Range 10 East,

among the several owners thereof, as set out in said judgment, and

Whereas, said Sheriff thereupon advertised said property for sale by giving due and legal notice of the time and place of said sale and the description of the property to be sold, by advertising the same in The Democrat News, a newspaper of general circulation and printed and published in Creek County, Oklahoma, once a week for more than thirty days prior to the day of sale, which was the 30th day of September 1940, and

8 Whereas, on the 30th day of September 1940, pursuant to said Notice of Sale, said Sheriff did offer said property for sale at public auction at the North front door of the Court House in the City of Sapulpa, Creek County, Oklahoma, at the hour of ten o'clock A. M. at which sale said real estate, was sold and struck off to the said D. B. Hellard, party of the second part, for the sum of $1,500.00, he being the highest bidder and that being the highest sum bid and being more than two-thirds of the appraised value thereof.

Whereas, said Sheriff having made return of said order of sale into court on the 2nd day of October 1940, with his proceedings thereunder duly certified and endorsed thereon, and the said Court having examined said proceedings and being satisfied that said sale was made in all respects in conformity with the law and said alias order of said did on the 7th day of October 1940, confirm and approve said sale and directed said Sheriff to make and execute to said purchaser, D. B. Hellard, party of the second part, a good and sufficient deed to all of said property so sold.

Now, Therefore, the Sheriff of Creek County, Oklahoma, aforesaid party of the first part, by virtue of said alias order of sale and in pursuance of the Statutes in such case made and provided, and for and in consideration of the sum above mentioned to him in hand paid by D. B. Hellard, party of the second part, the receipt of which is hereby acknowledged, has granted, bargained, sold and confirmed and by these presents doth, grant, bargain, sell, convey, and confirm unto said party of the second part, his heirs and assigns, all of the estate, right, title and interest which each, every and all of the parties to said action hereinabove described and in particular Ethleene Fulsom now Bevenue, Deshalecoweneÿ (Joe) Hay, Modie Hay, Eva Hay now Barnett, Lofa Hay, Anderson Allen and Sacota Had had at the commencement of said action, or at any time thereafter had, or now have, in and to the following described real estate and premises, situate in Creek County, State of Oklahoma, to wit:

9 Southwest Quarter of Section 25, Township 18 North, Range 10 East,

together with all and singular the tenements, improvements, hereditaments and appurtenances thereon and thereunto belonging or in any wise appertaining.

To have and to hold the said real estate and premises together with the appurtenances thereunto said party of the second part his heirs and assigns, forever, as fully and absolutely as he, the Sheriff aforesaid, can, may or ought to by virtue of the said alias order of sale, confirming said sale, and the statutes in such case made and provided, grant, bargain, sell, convey, and confirm the same.

In witness whereof, the party of the first part, the Sheriff of Creek County, Oklahoma, has hereunto set his hand and seal the day and year first above written.

[SHERIFF'S SEAL] LEW WILDER.
Sheriff of Creek County, Oklahoma.

Revenue Stamps $1.65 cancelled.

[Verification omitted.]

Filed for record in office of County Clerk, Creek County, Oklahoma, October 12, 1940, at 3:30 P. M. and recorded in Book 473, Page 112.

[File endorsement omitted.]

Statement re notice, summons, and order extending time

[Plaintiff's notice to the Superintendent of the Five Civilized Tribes, with Marshal's return, was filed July 9, 1941. A summons, with Sheriff's return, was filed July 10, 1941. On July 16, 1941, an order was entered granting the United States of America thirty days from July 23, 1941, within which to plead. Alias summons, with Sheriff's return, was filed August 4, 1941.]

10 In District Court of Creek County

General appearance and waiver of summons

Filed Aug. 19, 1941

Comes now the defendant, Lofa Hay, waives the issuance and service of summons in the above numbered and entitled cause, and enters his general appearance herein, and such defendant hereby appoints and designates James J. Mapes, attorney at law, Sapulpa, Oklahoma, and M. S. Robertson, U. S. Probate Attorney, as his true and lawful attorneys at law to represent him in the above numbered and styled cause, being absent from Oklahoma engaged in Indian School work in State of New Mexico.

LOFA HAY.

Subscribed and Sworn to before me at Albuquerque, New Mexico, this 11th day of August 1941. Isabell Benton, Notary Public. My Commission expires 26 day of January 1943. (Seal.)

[File endorsement omitted.]

In District Court of Creek County

Answer of defendants

Filed Aug. 19, 1941

Come now Ethleene Fulsom now Bevenue, Deshalecoweney (Joe) Hay, Modie Hay, Eva Barnett, nee Hay, and Lofa Hay, and for their answer to the petition of D. B. Hellard filed against them as defendants herein, state and aver:

That heretofore in Partition suit No. 23920, filed and prosecuted by them as plaintiffs against SaKcota Hay, nee Staley, and Anderson Allen or Charcotetenna as defendants therein, and co-defendants herein, said suit having been determined and settled in this court and partition made under proper orders of this court and sale as directed made and deed issued, executed and delivered under order of this court by the former Sheriff of Creek County, Oklahoma, conveying to the plaintiff the land in question in this action, to wit:

the SW 4 of section 25, Twp. 18 N. Rg. 19 E.

These answering defendants aver that the Court at their instance sold all their interest, right, and title to said tract
11 of land and therefore they claim no interest, right, or title to said land as against the plaintiff or any of the parties to said action they all having been declared and adjudged to be the heirs of Polly Charcotetenna, deceased, the allottee and owner of said land. Wherefore defendants pray the court that they may go hence without costs in this action.

JAMES J. MARS,
Attorney for above named defendants.
M. S. ROBERTSON,
U. S. Probate Attorney.

[File endorsement omitted.]

Statement as to summons and order extending time

[A summons, with Sheriff's return, filed August 23, 1941. On August 27, 1941, an order was entered granting the United States of America fifteen days additional time within which to plead.]

In District Court of Creek County

Petition for removal of cause to the United States District Court for the Northern District of Oklahoma

Comes now the United States of America, by Whit Y. Mauzy, United States Attorney for the Northern District of Oklahoma, acting under the direction of the Attorney General of the United States and at the request of the Secretary of the Interior of the United States, and in its own behalf and in behalf of the restricted Creek Indians concerned therein for cause of action alleges and states:

I

That your petitioner was served with notice and certified copy of the pleadings in this cause of action on July 8, 1941, under the provisions of the Act of Congress of April 12, 1926, which was an Act amending an Act of Congress of May 27, 1908, concerning suits involving Indian lands and providing for the United States to join in certain actions for the purpose of making
12 judgments binding on the United States of America, and this petitioner, United States of America, states that it is an interested party in this cause of action for the reason that the petition filed in this court shows that the controversy involves title to certain lands in Creek County heretofore allotted to one Polly Charcotetenña, a full-blood Creek Indian appearing opposite Roll No. 6892.

II

Your petitioner further shows to the court that under the provisions of the Act of Congress of April 12, 1926, the United States of America, in causes of this nature when served with notice and certified copy of all pleadings filed in this court, may, within twenty (20) days after service having been made on the Superintendent of the Five Civilized Tribes, or within such extended time as the trial court, in its discretion, may permit, is given the right to remove such cause pending in the State Court to the United States District Court for such District by filing in such suit in the State Court a petition for removal thereof to the United States District Court in the District where such suit is pending; that under the provisions of said Act of Congress it shall then be the duty of the State Court to accept such petition and proceed no further in said cause.

III

Your petitioner further shows to the court that this petition was filed within the time required by said Act of Congress and because the United States of America has jurisdiction and con-

trol over the property of the restricted Indians of the Five Civilized Tribes and for the reason that the parties to this cause of action are restricted Creek Indians, your petitioner is an interested and necessary party in the final determination of the issues in this cause of action, and that said service of summons and the certified copy of the pleadings on the Superintendent of the Five Civilized Tribes as hereinabove set out requires that the United States of America enter its appearance herein for the purpose of removing this cause to the United States District Court for the Northern District of Oklahoma, that said cause may there
13 proceed with the United States of America as an interested and necessary party herein.

IV

That the notice and certified copy of the pleadings served on the Superintendent of the Five Civilized Tribes at Muskogee, Oklahoma, are hereto attached and made a part of the petition for removal as required by said Act of Congress.

Wherefore, your petitioner prays that pursuant to the Act of Congress of April 12, 1926, and the service had on the Superintendent of the Five Civilized Tribes, this cause of action commenced in the District Court of Creek County, Oklahoma, be removed therefrom to the United States District Court for the Northern District of Oklahoma and there proceeded with as a cause originally commenced in that court.

WHIT Y. MAUZY,
United States Attorney.

[Verification omitted.]

Statement as to notice of hearing on petition for removal

[A notice to counsel for plaintiff of hearing on petition for removal, with acknowledgment of service, was filed August 27, 1941.]

In District Court of Creek County

Order of removal and directing clerk of State court to certify record

Filed Aug. 27, 1941

Now on this 27th day of August 1941, this cause coming on before the Honorable C. O. Beavers, Judge of the District Court of Creek County, Oklahoma, on petition of the United States of

America filed herein under and by authority of the Act of Congress of April 12, 1926, upon proper service in causes of this nature mentioned in said Act, said cause may be removed to the United States District Court.

And it further appearing to the Court that this is a cause in which the Superintendent of the Five Civilized Tribes at
14 Muskogee, Oklahoma, has been duly and properly served with notice and a certified copy of the pleadings in this cause as provided by said Act of Congress, and it further appearing to the Court that the controversy herein involves title to certain lands allotted to Polly Charcotetenna, a full-blood Creek Indian appearing opposite Roll No. 6892, and that the United States of America is a proper and necessary party in causes of this nature that come under said Act of Congress, and that the United States District Court for the Northern District of Oklahoma has jurisdiction of the controversy arising between the parties herein for the reason that there is an Act of Congress involved in the determination of the issues in said cause.

It is, therefore, on motion of the counsel for the United States of America as provided for in said Act of Congress, and proper petition filed herein, ordered that said petition be and the same is hereby accepted and approved.

It is the further order of the court that the clerk of this court is hereby directed to make and certify the record in this cause for transmission to the United States District Court for the Northern District of Oklahoma.

C. O. BEAVER,
District Judge,
Creek County, Oklahoma.

[File endorsement omitted.]

[Clerk's certificate to foregoing transcript omitted in printing.]

16 In United States District Court, Northern District of Oklahoma

Motion for permission to intervene

Filed Oct. 6, 1941

Comes now the United States of America by Whit Y. Mauzy, United States Attorney for the Northern District of Oklahoma and Chester A. Brewer, Assistant United States Attorney for said District, and moves the court for an order permitting the United States to intervene in the above entitled cause of action and for grounds of said motion, states:

I

That this is an action involving lands allotted to a full-blood Creek Indian. That the United States has been served with Notice and copies of the pleadings in this cause filed in the District Court of *of* Creek County, Oklahoma, pursuant to the provisions of the Act of Congress of April 12, 1926.

II

That the plaintiff in his petition seeks a decree quieting title to lands allotted to a full-blood Creek Indian.

WHIT Y. MAUZY,
United States Attorney,
CHESTER A. BREWER,
Assistant United States Attorney,
Attorneys for Intervener,
335 Federal Building, Tulsa, Oklahoma.

[File endorsement omitted.]

Copies mailed to Attorneys of record this 6th day of October, 1941.

CHESTER A. BREWER.

In United States District Court

Order granting leave to intervene

Filed Oct. 6, 1941

Now on this 6th day of October, 1941, this matter coming on before the court upon the motion of the United States of America for permission to intervene in this cause of action and it appearing to the court that this action involves lands allotted to
17 a restricted Creek Indian and that the United States of America should be a party to this action,

It is therefore the order of this court that the United States of America be and it hereby is granted permission to intervene in this cause of action.

F. E. KENNAMER, *Judge.*

O. K. As To Form: Service Of Copy Acknowledged:

WHIT Y. MAUZY,
United States Attorney.
CHESTER A. BREWER,
Assistant United States Attorney.

Copies mail' to Attorneys of record this 6th day of October 1941.

CHESTER A. BREWER.

[File endorsement omitted.]

In United States District Court

Complaint in intervention

Filed Dec. 1, 1941

Comes now the United States of America by Whit Y. Mauzy, United States Attorney for the Northern District of Oklahoma and Chester A. Brewer, Assistant United States Attorney for said District, and for its complaint in intervention in this cause of action alleges and states that this intervener appears herein in its own behalf and in behalf of Ethleene Fulsom now Bevenue, Anderson Allen, otherwise known as Anderson Char-co-te-ten-na, Sako-tah Hay, nee Staley, Deshalecoweney Hay, otherwise known as Joe Hay, Modie Hay, Eva Barnett, nee Hay, and Lofa Hay, restricted Creek Indians, and for complaint in intervention states:

I.

That the United States of America was served with Notice and copies of all pleadings on file in the District Court of Creek County, Oklahoma, in the above cause of action by service of the same on the superintendent of the Five Civilized Tribes under the provisions of the Act of Congress of April 12, 1926 (44 Stat. 239), and this intervener entered its appearance in said cause of
18 action in the District Court of Creek County, Oklahoma, and removed said cause to this court.

II.

This intervener further alleges that the land involved in this cause of action was duly allotted to Polly Char-co-ten-na, a full-blood Creek Indian appearing opposite Roll No. 6892, who died intestate on the 5th day of January 1938, seized and possessed of the land hereinafter described:

The Southwest Quarter (SW¼) of Section Twenty-five (25), Township Eighteen (18) North, Range Ten (10) East, Creek County, Oklahoma.

III.

That at the time of the death of Polly Char-co-ten-na, full-blood Creek Indian appearing opposite Roll No. 6892, she left as her sole and only heirs at law the following persons:

John Hay, son, Anderson Allen, otherwise known as Anderson Char-co-te-ten-na, grandson, Ethleene Fulson, now Bevenue, granddaughter,

and that the land above described descended to them under the laws of descent and distribution of the State of Oklahoma in equal shares. That each of said Indians above named were restricted Creek Indians.

IV.

That John Hay, full-blood Creek Indian appearing opposite Roll No. 6895, died intestate on March 16, 1938, and at the date of his death was seized and possessed of an undivided one-third interest in the above described land. That the said John Hay left surviving him as his only heirs at law the following persons:

Sa-ko-tah Hay, nee Staley, surviving widow, Dashalecoweney Hay, child, Modie Hay, child, Eva Barnett, nee Hay, child, and Lofa Hay, child.

V.

Intervener further alleges that suit was instituted in the District Court of Creek County, Oklahoma, entitled Ethleene Fulsom, now Bevenue et al., v. Anderson Allen et al., No. 25920; that
19 judgment was entered in said proceedings and a Sheriff's deed issued in partition by the then Sheriff of Creek County, Oklahoma. That said judgment and the proceedings thereunder and the Sheriff's deed in partition issued therein are void and of no force and effect and said Sheriff's deed should be by decree of this court cancelled and vacated of record and the title to the above described land should be quieted in Ethleene Fulsom, now Bevenue, Anderson Allen, otherwise known as Anderson Char-co-te-ten-na, Sa-ko-tah Hay, nee Staley, Deshalecoweney Hay, otherwise known as Joe Hay, Modie Hay, Eva Barnett, nee Hay, and Lofa Hay, for the reason that the State Court was without jurisdiction of said action because of the absence of the United States of America as a necessary and indispensable party, and for the further reason that service was not had on the Superintendent of the Five Civilized Tribes pursuant to the provisions of Section 3 of the Act of Congress of April 12, 1926.

Wherefore, this intervener demands that the Sheriff's deed in partition sale dated October 18, 1940, from Lew Wilder Sheriff of Creek County, Oklahoma, to D. B. Hellard, which deed was filed of record in the office of the County Clerk of Creek County, Oklahoma, on October 12, 1940, and recorded in Book 473, at Page 112, to be vacated and cancelled of record and that the title to the Southwest Quarter (SW¼) of Section 25, Township 18 North,

Range 10 East, Creek County, Oklahoma, be quieted in Ethleene Fulsom, now Bevenue, Anderson Allen, otherwise known as Anderson Char-co-te-ten-na, Sa-ko-tah Hay, nee Staley, Deshalecoweney Hay, otherwise known as Joe Hay, Modie Hay, Eva Barnett, nee Hay, and Lofa Hay, and that the plaintiff D. B. Hellard be decreed to own no right, title, or interest in or to the above described land, and that said plaintiff be restrained and enjoined from claiming or asserting any right, title, or interest in or to said land, and that this intervener recover his costs herein.

WHIT Y. MAUZY,
United States Attorney,
CHESTER A. BREWER,
Assistant United States Attorney,
Attorneys for Intervener,
335 Federal Building, Tulsa, Oklahoma.

Copies mailed Attorneys of record this 1st day of December 1941.

CHESTER A. BREWER.

[File endorsement omitted.]

In United States District Court

Answer and reply of plaintiff to complaint in intervention

Filed Dec. 19, 1941

Comes now the plaintiff, and for answer and reply to the complaint in intervention filed in the above numbered and styled cause by the United States of America, alleges and says:

I.

That he admits the allegations of numerical Paragraphs I, II, III, and IV of such complaint of intervention.

II.

For further answer, plaintiff admits the allegations of numerical Paragraph V of such complaint in intervention, except the allegation that the judgment rendered in said cause 25,920 of the causes pending in the District Court of Creek County, Oklahoma, and the Sheriff's deed issued therein are void and of no force and effect, and in this connection plaintiff alleges and says that the United States of America was not a necessary and indispensable party thereto, and further says that no notice was required to be given to the Superintendent of the Five Civilized Tribes of the pendency of said action pursuant to the provisions of Section 3 of the Act of Congress of April 12, 1926 (44 Stat. 239), and your

plaintiff alleges and says that the District Court of Creek County, Oklahoma, was vested with jurisdiction to hear and determine said action under the provisions of Section II of the Act of Congress of June 14, 1918 (40 Stat. 606), and plaintiff says that the judgment rendered in said cause is a valid and binding adjudication and the deed issued pursuant thereto vested the fee simple title in said premises in this plaintiff.

Wherefore, having fully answered, plaintiff prays for
21 judgment in accordance with the prayer of his petition herein.

GEORGE H. JENNINGS,
Attorney for Plaintiff,
Sapulpa, Oklahoma.

I hereby certify that I served true copies of the above answer upon *Council* for all other parties.

GEORGE H. JENNINGS.

[File endorsement omitted.]

In United States District Court

Agreed statement of facts

Filed Sept. 17, 1942

It is Hereby Stipulated and Agreed by and between the plaintiff, acting through his attorney of record, George H. Jennings, and the United States of America, by Whit Y. Mauzy, United States District Attorney for the Northern District of Oklahoma, acting under the direction of the Attorney General of the United States in behalf of the United States, and in behalf of the restricted Creek Indians, defendants herein, that the following statement of facts shall govern the determination of all issues in this case:

I

That this action was instituted in the District Court of Creek County, Oklahoma, and notice of the pendency thereof was given to the Superintendent of the Five Civilized Tribes in the time and in the manner provided by the Act of Congress of April 12, 1926 (44 Stat. 239), and that the United States of America removed said cause to this court in conformity with the provisions of such Act of Congress.

II

That Polly Char-co-ten-na was a full-blood member of the Creek or Muskogee Tribe of Indians duly enrolled as such opposite

Roll Number 6892, and that the lands involved in this action were duly allotted to her, the said Polly Char-co-ten-na, as her distributive share of the lands of said Tribe; that allotment deed and homestead patent covering said lands were duly issued to her, the said Polly Char-co-ten-na, in the manner provided by law.

III

That on December 27, 1928, the said Polly Char-co-ten-na executed a Certificate of Tax Exemption selecting all of the lands involved in this action as tax exempt pursuant to the provisions of the Act of Congress of April 10, 1928 (45 Stat. 495); that said Certificate was approved by the Secretary of the Interior on January 14, 1930, and was recorded in the office of County Clerk of Creek County, State of Oklahoma, on the 30th day of April 1930.

IV

That the said Polly Char-co-ten-na died intestate on the 5th day of January 1938, and was at the time of her death a resident and citizen of Creek County, Oklahoma, and was seized and possessed of the above lands.

That she, the said Polly Char-co-ten-na, left surviving as her sole and only heirs the following named persons: John Hay, a son; Anderson Allen, or Char-co-ta-ten-na a grandson, and Ethleene Fulsom, now Bevenue, a great grand-daughter, and that such lands descended to them under the laws of the State of Oklahoma in equal shares. That the said John Hay was a full-blood member of the Creek or Muskogee Tribe of Indians duly enrolled as such opposite Roll Number 6895 on the approved Rolls of said Tribe, and the said Anderson Allen and Ethleene Fulsom, now Bevenue, are each *unenrolled* full-blood members of said Creek Muskogee Tribe of Indians.

That John Hay died intestate on the 28th day of March 1928, and was at the time of his death a resident of Creek County, Oklahoma, and was vested and possessed of the interest in the lands involved in this action which was so inherited by him from the said Polly Char-co-ten-na, as aforesaid, and that the said John Hay left surviving as his sole and only heirs the following persons:

Sa-ko-tah Hay, nee Staley, his surviving widow; Deshalecoweney Hay, a son; Modie Hay, a son; Eva Barnett, now Hay, a daughter; Lofa Hay, a son.

That Sa-ko-tah Hay, nee Staley, Deshalecoweney Hay and Modie Hay are each full-blood Indians, duly enrolled as such opposite Roll Number 1910, 6897, and NB 850, respectively,
23 upon the approved rolls of said Tribe, and that Eva Barnett, nee Hay, and Lofa Hay are each unenrolled full-blood, members of said Tribe.

V

That on the 20th day of March 1940, Ethleene Fulsom, nee Bevenue, Deshalecoweney Hay, Modie Hay, Eva Barnett, nee Hay and Lofa Hay instituted an action in the District Court of Creek County, State of Oklahoma, against Anderson Allen, or Char-co-te-ten-na, and Sa-ko-tah Hay, nee Staley, seeking the partition of the lands involved in this action; which case was docketed under cause number 23920 of the causes pending in said court; that service of summons was had upon the defendants named in said action in the manner provided by the laws of the State of Oklahoma; that thereafter and on the 24th day of June 1940, a judgment was entered in said cause directing the partition of the lands involved therein, and herein involved; and that pursuant to said judgment said lands were sold to D. B. Hellard, plaintiff herein, and said sale was duly confirmed by the District Court of Creek County, State of Oklahoma. That no appeal was had from such judgment, and pursuant thereto a sheriff's deed in partition was executed to the said D. B. Hellard by the Sheriff of Creek County, State of Oklahoma. That a true copy of said sheriff's petition herein, as Exhibit "A" thereto.

That the proceedings had in such cause were in strict conformity to the statutes of the State of Oklahoma providing for the partition of real estate, and that the United States was not named as a party defendant in said action, nor was the United States served with process, and notice of the pendency of said partition suit was not given or served upon the Superintendent of the Five Civilized Tribes in the manner provided by Section 3, of the Act of Congress of April 12, 1926 (44 Stat. 239).

Dated this — day of September 1942.

GEORGE H. JENNINGS,
Attorney for Plaintiff.
WHIT Y. MAUZY,
United States Attorney.

[File endorsement omitted.]

24 In United States District Court

Findings of fact and conclusions of law

Filed Oct. 30, 1942

This cause having come on for hearing on an agreed statement of facts filed herein by the plaintiff, defendants and intervener, and the Court being fully advised in the premises, finds:

Findings of fact

The court finds the facts in this case to be as shown by the agreed statement of facts filed herein, and as follows:

I

That this action was instituted in the District Court of Creek County, Oklahoma, by the plaintiff, D. B. Hellard, against the defendants above named to quiet title to the following described premises, situate in said county, to wit:

The Southwest Quarter (SW4) of Section Twenty-five (25), Township Eighteen (18) North, Range Ten (10) East;

Written notice of the pendency of this action was given to the Superintendent of the Five Civilized Tribes in the manner provided by Section 3 of the Act of Congress of April 12, 1926, 44 Stat. 239, and this cause was duly removed to this Court by the United States of America in conformity with the provisions of such Act of Congress.

II

That Polly Char-co-te-ten-na was a full-blood member of the Creek or Muskogee Tribe of Indians duly enrolled as such opposite Roll Number 6892, and the lands involved in this action were duly allotted to her, the said Polly Char-co-te-ten-na, as her distributive share of the lands of said Tribe; that allotment deed and homestead patent covering said lands were duly issued to her, the said Polly Char-co-te-ten-na, in the manner provided by law.

III

That on December 27, 1928, the said Polly Char-co-te-ten-na executed a Certificate of Tax Exemption selecting the lands involved in this action as tax exempt pursuant to the provi-
25 sions of the Act of Congress of April 10, 1928 (45 Stat. 495); that said Certificate was approved by the Secretary of the Interior on January 14, 1930, and was recorded in the office of County Clerk of Creek County, State of Oklahoma, on the 30th day of April 1930.

IV

That the said Polly Char-co-te-ten-na died intestate on the 5th day of January 1938, and was at the time of her death a resident and citizen of Creek County, Oklahoma, and was seized and possessed of the above lands.

That the said Polly Char-co-te-ten-na, left surviving as her sole and only heirs the following named persons: John Hay, a son; Anderson Allen, or Char-co-te-ten-na, a grandson; and Ethleene Fulsom, now Bevenue, a great granddaughter, and that such lands descended to them under the laws of the State of Oklahoma in equal shares. That the said John Hay was a full-blood member of the Creek or Muskogee Tribe of Indians duly enrolled as such opposite Roll Number 6895 on the approved Rolls of said Tribe, and the said Anderson Allen and Ethleene Fulsom, now Bevenue, are each unenrolled full-blood members of said Creek or Muskogee Tribe of Indians.

That John Hay died intestate on the 28th day of March 1928, and was at the time of his death a resident of Creek County, Oklahoma, and was vested and possessed of the interest in the lands involved in this action which was so inherited by him from the said Polly Char-co-te-ten-na, as aforesaid, and that the said John Hay left surviving as his sole and only heirs the following persons:

Sa-ko-tah Hay, nee Staley, his surviving widow; Deshalecoweeney Hay, a son; Modie Hay, a son; Eva Barnett, now Hay a daughter; Lofa Hay, a son;

That Sa-ko-tah Hay, nee Staley, Deshalecoweney Hay and Modie Hay are each full-blood Indians, duly enrolled as such opposite Roll Number 1910, 6897, and NB 850, respectively, upon the approved rolls of said Tribe, and that Eva Barnett, nee Hay, and Lofa Hay are each unenrolled full-blood members of said Tribe.

26 V.

That on the 20th day of March 1940, Ethleene Fulsom, nee Bevenue, Deshalecoweney Hay, Modie Hay, Eva Barnett, nee Hay and Lofa Hay instituted an action in the District Court of Creek County, State of Oklahoma, against Anderson Allen, or Char-co-te-ten-na, and Sa-ko-tah Hay, nee Staley, seeking the partition of the lands involved in this action; which case was docketed under cause number 23920 of the causes pending in said court; that service of summons was had upon the defendants named in said action in the manner provided by the laws of the State of Oklahoma; that hereafter and on the 24th day of June

1940, a judgment was entered in said cause directing the partition of the lands involved therein, and herein involved; and that pursuant to said judgment said lands were sold to D. B. Hellard, plaintiff herein, and said sale was duly confirmed by the District Court of Creek County, State of Oklahoma. That no appeal was had from such judgment, and pursuant thereto a sheriff's deed in partition was executed to the said D. B. Hellard by the Sheriff of Creek County, State of Oklahoma.

That the proceedings had in such cause were in strict conformity to the statutes of the State of Oklahoma providing for the partition of real estate, and that the United States was not named as a party defendant in said action, nor was the United States served with process, and notice of the pendency of said partition suit was not given or served upon the Superintendent of the Five Civilized Tribes in the manner provided by Section 3 of the Act of Congress of April 12, 1926 (44 Stat. 239).

Conclusions of law

The court concludes as a matter of law:

I.

That the District Court of Creek County, Oklahoma, was vested with jurisdiction to order and decree the partition and sale of the lands involved in this action by virtue of the provisions of Section 2 of the Act of Congress of June 14, 1918
27 (40 Stat. 606) United States vs. Bond, C. C. A. 10, 108 Fed. (2) 504; United States vs. Watashe, C. C. A. 10, 117 Fed. (2) 947.

II

That the United States of America was not a necessary and indispensable party to the action so instituted in the District Court of Creek County, Oklahoma, to partition the lands involved herein and service of notice in the manner authorized by Section 3 of the Act of Congress of April 12, 1926 (44 Stat. 239), was not required as a prerequisite to the jurisdiction of such court to order and decree the partition of such lands.

III

That no provision was made by Congress in the Act of June 14, 1918, supra, or any other Congressional enactment for making the United States of America a party to an action in State Court to partition lands acquired by inheritance or devise by restricted members of the Five Civilized Tribes, and no authority existed

for giving notice to the United States of America of the pendency of such an action prior to the passage of the Act of April 12, 1926, supra. To determine that the United States of America is a necessary and indispensable party to such an action is in effect to hold that Section 2 of the Act of June 14, 1918, supra, was wholly without force and effect until the passage of the Act of April 12, 1926, for the reason that the United States cannot be made a party to any action or proceeding in the absence of its consent (Minnesota vs. United States, 305 U. S. 382, 83 L. ed. 236). The act in question should not be given a construction which would lead to such an absurd and futile result (United States vs. American Trucking Association, 310 U. S. 534, 84 L. ed. 1345).

IV

That neither the Secretary of the Interior, nor the Superintendent of the Five Civilized Tribes are vested with the custody and control of proceeds derived from the voluntary alienation or partition of lands acquired by inheritance or devise by restricted members of the Five Civilized Tribes, but on the
28 contrary, all restrictions upon such proceeds have been removed by the applicable Acts of Congress.

Section 9 of the Act of Congress of May 27, 1908 (35 Stat. 312), as amended by Section 1 of the Act of Congress of April 12, 1926 (44 Stat. 239), provides in part:

"The death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: Provided, that hereafter no conveyance by any full-blood Indian of the Five Civilized Tribes of any interest in lands restricted by Section 1 of this Act acquired by inheritance or devise from an allottee of such lands shall be valid unless approved by the County Court having jurisdiction of the settlement of the estate of the deceased allottee or testator: * * *"

The purpose of the requirement for approval by the County Court is to safeguard the interest of the full-blood heir; to see that he shall not be wronged by any sale he might desire to make; that the consideration shall be ample; and that he shall, in fact, receive it (Lykins vs. McGrath, 184 U. S. 169; 46 L. ed. 485; Harris vs. Bell, 254 U. S. 103; 65 L. ed. 159, Kiker vs. United States, C. C. A. 10, 63 Fed. (2) 937).

This statute was amended by Section 8 of the Act of January 27, 1933 (44 Stat. 777), to provide for the approval of conveyances by full-blood heirs and devisees of such Tribes to be had in open Court, after notice by publication, and to the United States

Probate Attorney, in the manner provided by the Rules of procedure in Probate matters, adopted by the Supreme Court of Oklahoma in June of 1914.

Rule 10 of the Rules of procedure in probate matters, adopted by the Supreme Court of Oklahoma in June of 1914, in addition to providing procedure for the approval of such conveyances, provides as follows:

"When it shall appear for the best interests of the Indian, approval will be withheld unless the grantor agree, in writing, for the deposit of the proceeds derived from the sale of the land to be expended subject to the approval of the County Court."

29 And Section 2 of the Act of June 14, 1918, provides, in part:

"Any land allotted in such proceedings to a full blooded Indian or conveyed to him upon his election to take the same at the appraisement shall remain subject to all restrictions upon alienation and taxation obtaining prior to such partition. In case of a sale under any decree or partition, the conveyance thereunder shall operate to relieve the land described of all restrictions of every character."

The above quoted Statutory enactments negative any claim that either the Secretary of the Interior or the Superintendent of the Five Civilized Tribes are entitled to the control or custody of the proceeds to be derived either from the voluntary alienation or the sale in partition of the lands acquired by inheritance or devise by restricted members of the Five Civilized Tribes.

V

That the case of Minnesota vs. United States, 305 U. S. 382, 83 L. ed. 236, is not controlling in the determination of the questions presented in this case, for the following reasons:

A. The Act of June 14, 1918, supra, unlike the Statute involved in the Minnesota case, specifically confers jurisdiction upon the District Courts of the State of Oklahoma to order and decree the partition and sale of lands acquired by inheritance and devise by restricted members of the Five Civilized Tribes.

B. The Act involved in the Minnesota case made no provision for the protection of the Indian against an improvident judgment and sale in condemnation, while the Act of June 14, 1918, adopts the applicable statutes of the State of Oklahoma, providing for the partition of real estate, and makes adequate provision for the appraisement and sale of lands acquired by inheritance or devise by restricted members of the Five Tribes under judicial super-

vision in the event partition cannot be made in kind. The District Courts of the State of Oklahoma, in exercising the authority granted to them, act as Federal agencies. They are the agencies selected by Congress and the authority confided to them is to be exercised in giving effect to the will of Congress in respect to a matter within its control.

C. The Secretary of the Interior was granted supervision of the proceeds to be derived from the sale of lands in condemnation by virtue of the Act of Congress of June 30, 1932 (47 Stat. 474) while no such provision has been made by Congress for the supervision of the proceeds to be derived from the voluntary sale, or the sale in partition, of lands acquired by inheritance or devise by restricted members of the Five Civilized Tribes.

VI

The case of Grand River Dam Authority vs. Parker, 40 Fed. Supp. 82, is not applicable or controlling in the determination of this case, for the same reasons assigned to the Minnesota case, supra.

In addition, although the lands involved in the Grand River Dam Authority vs. Parker case were inherited lands yet no question was raised by counsel in the trial of such cause as to the nature of the restrictions existing upon such lands, and it was conceded by all parties to such cause that the lands involved therein were restricted in the same manner and to the same extent as lands allotted to restricted members of the Five Civilized Tribes.

VII

That the plaintiff, D. B. Hellard, is the owner of the legal title in fee simple to the lands involved in this case and above described; that the defendants have no right, title or interest therein; that the plaintiff's title to said lands should be quieted and confirmed in him as against any claim on the part of the defendants and the intervener herein, and that the defendants, and each of them, should be perpetually restrained from claiming or asserting any right, claim or interest therein adverse to the title of the plaintiff.

ROYCE H. SAVAGE,
District Judge.

[File endorsement omitted.]

31 In United States District Court

Judgment

Filed Oct. 30, 1942

This cause comes on to be heard on this 30th day of October 1942; the plaintiff appearing by his attorney of record, George H. Jennings, and the defendants and intervener, United States of America, appearing by the Hon. Whit Y. Mauzy, United States Attorney, and the Court having heard the evidence, and being fully advised, finds the issues in favor of the plaintiff and against the defendants and intervener.

It is therefore ordered, adjudged, and decreed as follows:

That the plaintiff, D. B. Hellard, is the legal owner in possession of the premises described in the complaint herein, to wit:

The Southwest Quarter (SW4) of Section Twenty-five (25), Township Eighteen (18) North, Range Ten (10) East, Creek County, Oklahoma;

and that his title thereto is valid and perfect and superior to any right or interest claimed by defendants, and the intervener herein, and that defendants, and each of them, have no right, title or interest in and to said premises.

It is further ordered, adjudged, and decreed that the title and possession of said plaintiff in said premises be, and the same is hereby forever settled and quieted in the plaintiff as against all claim or demand by said defendants, and those claiming under them, or either of them, and against all claims or demands by the intervener, United States of America.

And it is further ordered, adjudged, and decreed that said defendants, and each of them, and those claiming by, through or under them, or either of them, be, and they are hereby, perpetually enjoined and forbidden to claim any right, title, interest or estate in or to said premises, hostile or adverse to the possession and title of the plaintiff herein.

ROYCE H. SAVAGE, *Judge*.

[File endorsement omitted.]

32 In United States District Court

Notice of appeal to the Circuit Court of Appeals

Filed Jan. 27, 1943

Notice is hereby given that intervener, the United States of America, hereby appeals to the Circuit Court of Appeals for the Tenth Circuit from the judgment entered in this cause on the 30th day of October 1942.

WHIT Y. MAUZY,
United States Attorney for the Northern District of Oklahoma.

[File endorsement omitted.]

[Clerk's certificate to foregoing transcript omitted in printing.]

33 In United States Circuit Court of Appeals

Minute entry

September 7, 1943

This cause came on to be heard, Marvin J. Sonosky, Esquire, appearing for appellant, George H. Jennings, Esquire, appearing for appellee.

Thereupon argument was commenced by counsel and continued to the hour of adjournment.

In United States Circuit Court of Appeals

Minute entry

September 8, 1943

34 This cause came on further to be heard, Marvin J. Sonosky, Esquire, appearing for appellant, George H. Jennings, Esquire, appearing for appellee.

Thereupon argument by counsel was concluded and the cause was submitted to the court.

35 In United States Circuit Court of Appeals, Tenth Circuit

Marvin J. Sonosky, Attorney, Department of Justice, (Norman M. Littell, Assistant Attorney General, Whitfield Y. Mauzy, United States Attorney, and Norman MacDonald, Attorney, Department of Justice, were with him on the brief) for Appellant.

George H. Jennings for Appellee.

Before PHILLIPS, BRATTON, and HUXMAN, Circuit Judges.

Opinion

October 29, 1943

BRATTON, Circuit Judge:

The question presented is whether the full-blood Creek Indian owners of a tract of restricted and tax-exempt land in Oklahoma were divested of title by a sale in partition in an action in the state court to which the United States was not a party.

The land was allotted to an enrolled Creek Indian of the full blood, and it was subsequently selected and certified as tax-exempt under the provisions of section 4 of the Act of May 10, 1928, 45 Stat. 495. The allottee died intestate in 1938, and the land descended in equal share to her son, grandson, and great
36 granddaughter. The son died, and his interest passed to his surviving widow and four children. All of the heirs of the allottee and those of her son were full-blood Creek Indians. In 1940, certain of the heirs instituted in the district court of the state a proceeding to partition the land. All of the heirs were parties but the United States was not, and no notice was served on the Superintendent of the Five Civilized Tribes under the provisions of section 3 of the Act of April 12, 1926, 44 Stat. 239. A judgment of partition was entered, pursuant thereto the land was sold by the sheriff, and D. B. Hellard became the purchaser. Hellard later instituted in the state court this action against the Indian heirs to quiet his title based upon the sheriff's deed. The Indians disclaimed. Notice was served on the Superintendent of the Five Civilized Tribes, the United States caused the action to be removed to the United States court and, later intervened, alleging that the proceedings in partition were void because the United States was not a party to the action, and praying that the sheriff's deed be cancelled and the title of the Indian heirs quieted. The trial court entered judgment quieting title in Hellard, and the United States appealed.

Section 19 of the Act of April 26, 1906, 34 Stat. 137, provides that no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole Tribes shall have power to sell, alienate, or dispose of any of the land allotted to him for a period of twenty-five years from and after the passage of the act, unless such restriction shall prior to the expiration of that period be removed by Act of Congress; and section 22 provides that the adult heirs of any deceased Indian of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his share of the land of the tribe to which he belongs, may

sell and convey the land inherited from such decedent, but that all conveyances made under the provision by heirs who are full-blood Indians shall be subject to the approval of the Secretary of the Interior, under such rules and regulations as may be prescribed by him. Section 1 of the Act of May 27, 1908, 35 Stat. 312, provides among other things that all allotted lands of enrolled, full-blood members of the Five Civilized Tribes shall
37 not be subject to alienation prior to April 26, 1931, except that the Secretary may remove such restrictions in whole or in part, under such rules and regulations as he may prescribe; and section 9, as amended by section 1 of the Act of April 12, 1926, supra, provides that the death of an allottee shall operate to remove all restrictions upon the alienation of such allottee's land, provided that no conveyance by any full-blood Indian of such Tribes of any lands restricted by section 1 acquired by inheritance or devise from the allottee shall be valid unless approved by the county court having jurisdiction of the settlement of the estate of such deceased allottee or testator. And section 1 of the Act of January 27, 1933, 47 Stat. 777, provides that where the entire interest in any tract of restricted and tax-exempt land belonging to members of the Five Civilized Tribes is acquired by inheritance, devise, gift, or purchase with restricted funds, by or for restricted Indians, such land shall remain restricted and tax-exempt during the life of and as long as it is held by such Indians, but not longer than April 26, 1956. It is clear that under these acts, without more, the district courts in Oklahoma would be without jurisdiction to partition restricted and tax-exempt land acquired through inheritance by full-blood members of the Five Civilized Tribes (Coleman v. Battiest, 65 Okl. 71, 162 Pac. 786; Hoodenpyl v. Champion, 71 Okl. 270, 177 Pac. 369).

But, recognizing the frequent need to partition land acquired in that manner, the Congress enacted the Act of June 14, 1918, 40 Stat. 606. Section 1 authorizes the probate court in Oklahoma having jurisdiction of the settlement of the estate of a deceased allottee, leaving restricted heirs, to determine the question of heirship; and section 2 provides that the lands of full-blooded members of any of the Tribes are made subject to the laws of the state respecting the partition of real estate, and that in case of a sale under a decree, or partition, the conveyance shall operate to relieve the land of all restrictions of every character. Under that statute the district courts of the state have jurisdiction to partition restricted lands acquired through inheritance by full-blood Indian heirs (Salmon v. Johnson, 78 Okl. 182, 189 Pac. 537, certiorari denied, 254 U. S. 641; Haymes v. McDermott,
38 Okl. 147, 256 Pac. 908; United States v. Bond, 108 F. (2d) 504; United States v. Watashe, 117 F. (2d) 947).

The proceedings in the action for partition are not before us but it is stipulated that they were in strict accord with the statutes of the state. The decree in that action and the conveyance executed by the sheriff pursuant to it are attacked on the sole ground that the United States was not a party to the action. The Act of June 14, 1918, supra, does not provide that the United States shall be made a party to an action for partition. It does not speak of making the United States a party. It is significantly silent in that respect. It appears on its face to be a complete enactment, subjects lands of the nature here involved to the jurisdiction of the district courts of the state for purposes of partition, and provides that a sale made in a partition action shall free the lands of all restrictions. Yet it will be searched in vain for any provision, suggestion, or indication of a Congressional intent or purpose to require that the United States shall be made a party to such an action. Congress has plenary power to impose, extend, or remove restrictions against the alienation of property belonging to full-blood members of the Five Civilized Tribes. The determination of the time and manner of imposing or removing restrictions rests with Congress. It was well within the sweep of the power of Congress to provide that lands belonging to full-blood members of the Tribes shall be subject to partition in the state courts, and that a sale made in a proceeding of that nature shall operate to remove all existing restrictions against alienation, without the United States being a party to the action (Hy-yu-tse-mil-kin v. Smith, 194 U. S. 401; Winton v. Amos, 255 U. S. 373). And Congress was free to entrust to the state courts having jurisdiction to partition lands generally the function of determining in a judicial proceeding in partition whether the land shall be sold and if so to order the sale, and that when such sale is made it shall constitute a removal of the restrictions against alienation. In short, Congress was free to select the district courts of the state as the agency and confide to them authority to determine in that manner whether the restrictions shall be extin-
39 guished (Parker v. Richard, 250 U. S. 235; Whitebird v. Eagle-Pitcher Lead Co., 40 F. (2d) 479). Taking into consideration the contex, the background, and the purpose to be served, we think that is the effect of the statute. Cf. Parker v. Richard, supra; Whitebird v. Eagle-Pitcher Lead Co., supra; State v. Huser, 76 Okl. 130, 184 Pac. 113.

As already indicated, section 1 of the Act of June 14, 1918, supra, authorizes the probate court of the state having jurisdiction of the settlement of the estate of a deceased allottee, leaving restricted heirs, to determine the question of heirship, with conclusive effect; section 9 of the Act of May 27, 1908, as amended by the Act of April 12, 1926, supra, provides that the death of an

On consideration whereof, it is now here ordered that said motion be and the same is hereby granted and that no mandate of this court issue herein for a period of thirty days from December 3, 1943, and that, if within said period of thirty days there is filed with the clerk of this court a certificate of the clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, with proof of service thereof under section 3 of rule 38 of the Supreme Court, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

38 In United States Circuit Court of Appeals

Order for further stay of mandate

December 31, 1943

This cause came on to be heard on the motion of appellant for a further stay of the mandate herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that said motion be and the same is hereby granted and that no mandate of this court issue herein on or before January 29, 1944, and that, if within said period of time there is filed with the clerk of this court a certificate of the clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, with proof of service thereof under section 3 of rule 38 of the Supreme Court, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

39 [Clerk's certificate to foregoing transcript, omitted in printing.]

40 Supreme Court of the United States.

Order allowing certiorari

Filed March 6, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File No. 48141. U. S. Circuit Court of Appeals, Tenth Circuit. Term No. 648. The United States of America, Petitioner vs. D. B. Hellard. Petition for a writ of certiorari and exhibit thereto. Filed January 29, 1944. Term No. 648 O. T. 1943.

U. S. GOVERNMENT PRINTING OFFICE 1944